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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-5335

BENJAMIN B. JACKSON, M. D. - - Petitioner

versus

LEO T. WOLFORD - - - - - Respondent

On Petition For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

PETITION NOT PRINTED

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OPINION BELOW

The opinion below is reported in 460 Fed. 2d 319.

QUESTION PRESENTED

Whether a simple malpractice suit against a private attorney is cognizable under the Civil Rights Act where there is no diversity of citizenship.

STATEMENT OF THE CASE

The Petitioner, a doctor residing in Louisville, Kentucky, brought this original action in the United States District Court for the Western District of Kentucky, claiming a violation of his civil rights pursuant to 42 U.S.C.A., Section 193 and 28 U.S.C.A., Sections

1131 and 1343, against the Respondent, a lawyer also of Louisville, Kentucky, for damages alleging ineffective, improper and careless representation in a matter arising out of Petitioner's relationship with hospital personnel. After depositions of both parties, the Respondent moved for Summary Judgment and submitted a memorandum demonstrating that his efforts on behalf of Petitioner were effective, proper and professional.

Without ever reaching the merits of the case, the District Court held that it was without jurisdiction because (1) 28 U.S.C.A. Section 1343(3), the jurisdictional statute, applies only if personal rights as contrasted with property rights, are impaired; (2) because the complaint failed to allege a deprivation under color of state law of plaintiff's constitutional rights, and (3) because the conduct of the attorney was not alleged to have been performed by a person acting under color of law.

Subsequent to the District Court's memorandum, the Supreme Court held in *Lynch* v. *Household Finance Corporation,* 92 S. Ct. 1113, that there is no distinction between personal rights and property rights as far as jurisdiction under 28 U.S.C.A. Section 1343(3) is concerned.

The District Court's decision was affirmed by the United States Court of Appeals for the Sixth Circuit and the Petitioner has now sought certiorari.

We respectfully oppose the granting of a writ of certiorari.

STATEMENT OF THE FACTS

Prior to 1970, Petitioner had performed almost all his surgical operations in the Norton Memorial Infirmary of Louisville, and the Respondent, prior to his death in 1971, was a lawyer engaged in the private practice of law.

Serious charges were preferred by hospital personnel against Petitioner in mid-1970 arising out of his unfortunate relations with the nursing service, his refusal to conform with hospital rules and regulations and his relationship with other members of the medical staff at the hospital. The charges were scheduled to be heard before the appropriate hospital committee and the Petitioner thereupon sought the advice and counsel of the Respondent to help him defend the charges and to represent him at the hearing. The two parties conferred and the Petitioner was advised by the Respondent to be cooperative and conciliatory with the hospital authorities and together they prepared a statement for Petitioner to read at the hearing (Wolford Dep., pp. 5 & 6). The Respondent was denied permission to appear at the hearing because the hospital had no lawyer present but he waited outside the hearing room while the committee was in session (Wolford Dep., p. 7). After the meeting had adjourned, the Petitioner reported that everything had gone well and apparently it had gone well because nothing transpired until two months later when in mid-September, the hospital authorities again advised Petitioner of a recurrence of his problems and he was again requested to meet before the committee (Wol-

ford Dep., p. 8 and Ex. 7). This time, without consulting the Respondent, the Petitioner undertook to respond directly to the committee in a manner that was anything but conciliatory (Wolford Dep., p. 9 and Ex. 8 & 9). The Petitioner seems to claim, however, that the Respondent advised him not to appear and that by relying on this advice, he was somehow prejudiced (Plaintiff's Dep., pp. 27, 28 & 29). In any event, the Respondent did nothing further in behalf of Petitioner except to talk on the phone in response to his many telephone calls (Wolford Dep., p. 10).

In a final call to the Respondent, the Petitioner discussed his deteriorating relations at the hospital and indicated to the Respondent that he wanted to institute suit against the hospital authorities for redress. The Respondent counseled against such litigation and advised that if the Petitioner persisted, the Respondent would not represent him and indicated no member of his law firm of which he was the senior partner would become so involved. One of the reasons given by the Respondent was that he had previously represented the hospital and did not relish the idea of instituting such litigation (Wolford Dep., p. 12).

Petitioner claims that he had no previous knowledge of the Respondent's former representation of the hospital and fancies that the former representation precluded the Respondent from rendering impartial, effective and competent service to the Petitioner. The Respondent, along with others, had been specially employed by the hospital to bring about the consolidation of Norton Memorial Infirmary and the Children's Hos-

pital into one hospital corporation. Final approval had been given his efforts by the Kentucky Court of Appeals in *Eitel* v. *John N. Norton Memorial Infirmary*, 441 S. W. 2d 438, decided in May, 1969. The Respondent's special representation of the hospital was concluded on September 12, 1969 when he submitted his bill for services which was paid on October 3, 1969. He did not represent the hospital thereafter (Wolford Dep., pp. 10 & 11).

ARGUMENT

The Petitioner has no civil rights case against the Respondent because according to *United States* v. *Commonwealth of Pennsylvania*, 281 F. Supp. 175 (1968):

> ". . . The essential elements of such a suit are: '. . . (1) the conduct complained of must have been done by some person acting under color of law; and (2) such conduct must have subjected the complainant to the deprivation of rights, privileges, or immunities secured to him by the Constitution and laws of the United States.' *Basista* v. *Weir*, 340 F. 2d 74, 79 (3d Cir. 1965)."

In that case where it was claimed that an attorney had ineffectively represented a defendant in a criminal trial, the Court held that

> ". . . Although an attorney is an officer of the Court, he does not act under color of law when he undertakes the defense of a person charged with crime."

Thus, if the attorney was not acting under color of law in *United States* v. *Commonwealth of Pennsylvania, supra,* the Respondent in this case could not have been acting under color of law when he advised a doctor on intra-hospital matters.

See *Kenny* v. *Fox,* 232 F. 2d 288 (6th Cir. 1956), where it was held a private attorney was not acting "under color of law" in advising the sheriff in connection with the institution of lunacy proceedings. Finally, the most recent case of *Fletcher* v. *Hook,* 446 F. 2d 14 (1971), involved a complaint alleging a tort claim for malpractice against an attorney for allowing a criminal case to be brought to trial without proper preparation. There again, the Court held that "such a tort against a professional man for malpractice 'is not cognizable under the Civil Rights Act'."

Petitioner's apparent suggestion that the receipt by Norton Memorial Infirmary of federal funds in some way brought this case under the Civil Rights Act is utterly without merit. The Civil Rights Act is obviously not concerned with the use or nonuse of federal funds. It is simply concerned with whether one acting under color of law has done something to deprive another of rights, privileges or immunities secured him by law.

Petitioner's argument that there is some conspiracy against him in violation of 42 U.S.C.A. Section 1985(3) is completely unfounded. The only allegations relating to conspiracy in the complaint as amended appear in paragraph 9 of Petitioner's amended complaint and are as follows:

"The Defendant and those conspiring with him have forced the Plaintiff and his family to live in a bell jar of public scrutiny to disprove by performance rumor of the most damaging nature."

Manifestly, such allegations do not meet the test laid down in *Valley* v. *Maule*, 297 F. Supp. 958.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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